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NO. 92-8836

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

JIMMIE BURDEN, JR.,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to determine whether the court of appeals exceeded the scope of this Court's remand in determining that the state court's "fact finding" with respect to the grant of immunity was not fairly supported by the record and, accordingly, not entitled to a presumption of correctness when this Court's remand opinion did not foreclose such an analysis?

II.

Where the court of appeals found that the record, reviewed in its entirety, did not show that Petitioner's attorney had negotiated a grant of immunity for a state's witness so that no conflict of interest had been shown, should this Court grant certiorari to review Petitioner's contention that the court improperly examined Georgia law regarding written requirements for grants of immunity as a factor in reaching that conclusion?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Jimmie Burden, Jr., was indicted by the Washington County, Georgia, Grand Jury upon special presentment during the December Term 1981 for the murders of Louise Wynn and her three children, which had occurred on or about August 16, 1974. (Trial Record 9-10). As the state sought the death penalty, the case was tried under Georgia's Unified Appeal

Procedure. Upon a jury trial on March 1-4, 1982, Petitioner was found guilty on all four counts. (Trial Record 10). The jury found the existence of four statutory aggravating circumstances under O.C.G.A. § 17-10-30(b)(2) and sentenced Petitioner to death for each of the four murders. (Trial Record 37-40). On direct appeal, the Supreme Court of Georgia affirmed the four murder convictions and three death sentences; the death sentence for Louise Wynn, however, was set aside as "mutually supporting" the death sentences for the other three murders. Burden v. State, 250 Ga. 313, 297 S.E.2d 242 (1983), cert. den., 460 U.S. 1103, rhng. den., 462 U.S. 1112 (1983).

Pursuant to an outstanding execution date, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, on July 13, 1983, and sought a stay of execution and leave to proceed in forma pauperis. The stay of execution as well as pauper's status was granted. Petitioner twice amended the petition. An evidentiary hearing was held on October 24, 1983. A second evidentiary hearing was set for March 1984 by order filed January 13, 1984. In a letter to the court dated March 1, 1984, Petitioner stated he had no additional evidence to present at a hearing, tendered an affidavit, and requested leave to file a brief. Respondent concurred that no additional hearing was necessary but objected to the admission of the affidavit. Briefs were then submitted

on behalf of the parties. Petitioner then attempted to amend the petition, and Respondent opposed any amendment. On June 29, 1984, the state habeas corpus court denied leave to amend because the hearing had been held and the record closed.

On September 6, 1984, the state habeas corpus court entered an order denying relief. Respondent moved for reconsideration of a portion of the order regarding the grand and traverse jury composition issue. On September 24, 1984, the state habeas corpus court granted the motion for reconsideration and vacated that portion of its order previously dealing with the jury composition issue; the court then specifically ruled that the jury issue had been procedurally defaulted under Georgia law due to the lack of timely objection and ruled there had been no showing of cause and actual prejudice. Petitioner then filed a notice of appeal as well as an application for a certificate of probable cause to appeal. The Supreme Court of Georgia denied the application on March 5, 1985. Certiorari was denied. Burden v. Kemp, ___ U.S. ___, 106 S.Ct. 187 (1985).

Petitioner then filed a second petition for writ of habeas corpus in the Butts County Superior Court, raising only the claim that Georgia's death penalty statute was discriminatorily applied against black people and persons accused of killing white people. Respondent moved to dismiss the petition as successive. On February 3, 1987, the state habeas corpus court

dismissed this second petition as successive. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on March 11, 1987. The remittitur was made the judgment of the state habeas corpus court on September 9, 1987.

Petitioner then filed an application for federal habeas corpus relief in the United States District Court for the Middle District of Georgia. (R1-4). Pursuant to the show-cause order of the judge, Petitioner filed a brief in support of the petition on March 16, 1988. (R1-6). An answer, brief and exhibits were subsequently filed by the warden. (R1-7, 8, 9). Petitioner filed a reply brief. (R1-10). Respondent then filed a motion and brief to strike previously unsubmitted evidence, consisting of a consent order in an unrelated civil action, as the order had been entered five months before Petitioner's first state petition was denied. (R1-11).

On July 12, 1988, the district court entered an order, denying habeas corpus relief. (R1-13). Judgment was entered in favor of Respondent on that same date. (R1-14).

Petitioner subsequently filed a notice of appeal, a motion for leave to proceed in forma pauperis and an application for a certificate of probable cause. (R1-15, 16, 17). The district court denied probable cause and leave to proceed as a pauper.

(R1-18). The Eleventh Circuit Court of Appeals subsequently granted the application for a certificate of probable cause.

Following the submission of briefs and oral argument, a panel of the Eleventh Circuit remanded the case to the district court for an evidentiary hearing on the sole issue of the alleged conflict of interest claim. Burden v. Zant, 871 F.2d 956 (11th Cir. 1989). Pursuant to the remand, an evidentiary hearing was held on June 1, 1989. Counsel for the parties thereafter submitted proposed orders to the district court. On September 20, 1989, the district court found that the factual basis underlying the conflict of interest claim lacked merit and that Petitioner had failed to establish that an actual conflict of interest existed which adversely affected counsel's performance. Petitioner thereafter filed a notice of appeal from that adverse decision.

On May 29, 1990, the panel entered its opinion, affirming the denial of habeas corpus relief as to all grounds. Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990). On or about June 8, 1990, Petitioner filed a motion to vacate opinion, permit briefing and oral argument and a motion to toll the time for filing a petition for rehearing and suggestion for rehearing en banc. After Respondent filed a response to the motion, on June 29, 1990, the court ordered the parties to file letter memoranda on the conflict of interest issue. On July 24, 1990,

the court denied Petitioner's motion to file a petition for rehearing and suggestion for rehearing en banc out of time. Petitioner then filed a motion for reconsideration of that denial on July 25, 1990. The petition for rehearing was denied on September 5, 1990. Petitioner thereafter filed a motion for stay of the mandate pending application for certiorari, and the court denied that motion on September 19, 1990. The mandate of the circuit court issued September 19, 1990, and was made the judgment of the district court on September 20, 1990.

Petitioner thereafter filed a petition for a writ of certiorari to this Court. On February 19, 1991, this Court granted certiorari, reversed and remanded the case so that the circuit court "may consider Petitioner's conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that Dixon testified under a grant of immunity." Burden v. Zant, ___ U.S ___, 111 S.Ct. 862 (1991).

The parties submitted supplemental briefs on the conflict of interest issue on remand and orally argued the case. On October 5, 1992, the panel entered its opinion, specifically finding that the state trial court's "observation" in its post-trial report that Dixon allegedly testified under a grant of immunity was not entitled to a presumption of correctness because material facts had not been sufficiently developed in the state courts. Burden v. Zant, 975 F.2d 771, 772, (11th Cir. 1992). The panel noted that this issue had been factually

developed at the federal evidentiary hearing on the conflict of interest claim and that the district court's factual finding that Dixon had not testified under a grant of immunity was not clearly erroneous. Id. at 775. The panel concluded that Petitioner's conflict of interest claim lacked merit. Id. at 776. Rehearing was denied April 19, 1993.

This petition seeks review of the panel opinion finding no conflict of interest. A review of the facts underlying Petitioner's convictions would aid this Court in resolving the issues presented in this case.

On direct appeal, the Supreme Court of Georgia found the following facts:

> On the evening of August 15 and morning of 16, 1974, four bodies were recovered from Smith's Pond in Washington County, identified as Louise Wynn and her three children, ages 2, 3, and 4. The autopsies revealed that Louise Wynn died from multiple blows to the head; that Marvin, age 4, and James, age 2, died from drowning; and that Melinda, age 3, died from strangulation. Louise was clothed only in an undergarment and

a dress torn in half. The crime scene revealed an area of disturbed pine straw, possibly evidencing a struggle. Investigators also discovered there an automobile lug wrench with what appeared to be bloodstains. After extensive investigation, law enforcement officials were unable to fix upon a suspect, and the case was placed in the unsolved file some two years later.

In late 1981, Henry Lee Dixon, a nephew of Burden, came forward with information leading to the arrest and indictment of this defendant.

Henry Lee Dixon testified that on August 13, 1974, Burden came to his house and asked to ride to town with him. He then directed Dixon to a liquor store where Burden purchased a can of beer and some liquor. Burden next directed Dixon to drive to Louise

Wynn's house. Burden, who had been drinking heavily all the while, went into the house, and after about 15 minutes returned with two older children, followed by Louise Wynn, who was carrying a baby. Burden told Dixon to drive, while he continued to drink, kissing and hugging Louise Wynn in the back seat. Dixon was then directed to stop along a dirt road leading to Smith's Pond, where Burden and the four victims got out of the car. Burden took from his car a shotgun, fishing poles and bait, and told Dixon to return later to pick them up. When Dixon returned he saw Burden walking down the road, he stopped and asked where the others were. Burden first said that Louise became angry and had gone to her mother's house. After Dixon wanted to go and get Louise Wynn, Burden said "he had [messed] up," that she "didn't act right" and he "hit her side the head with something" and that

"she fell in the pond or he throwed her in the pond one." Dixon then asked about the children, and Burden replied, "I reckon I damn well know where they are at, too." When Dixon suggested going back to the pond, Burden threatened him with a shotgun if he ever related the event to anyone.

The day after the bodies were discovered, Burden broke a pool cue over Dixon's head when he saw him talking with others, and again warned him not to mention the events of Tuesday.

Several witnesses testified that Burden and Louise Wynn were keeping social company with each other, having seen them together at various places just prior to Louise Wynn's death.

Two other witnesses testified as to physical assaults and attempted sexual

> assaults made upon them by Burden at times when he had been drinking. One such witness attributed to Burden the threat: "[H]e told me that he was going to throw me in a pond like he did somebody else."

Burden v. State, 250 Ga. at 313-14.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT DID NOT EXCEED THE SCOPE OF THIS COURT'S REMAND IN CONCLUDING THAT A HISTORIC FACT WAS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

In the first issue raised by Petitioner in this petition, Petitioner claims that the United States Court of Appeals for the Eleventh Circuit allegedly exceeded the scope of this Court's remand in not automatically affording a presumption of correctness to the trial court's statement in the post-trial report that Dixon had allegedly testified under a grant of immunity. Petitioner contends that the panel had no authority to determine under 28 U.S.C. § 2254(d) if one of the exceptions to the presumption of correctness applied in this case. Petitioner further contends that the panel impermissibly concluded that this "fact" was not entitled to a presumption of correctness, after the conflict of interest issue based on counsel's allegedly soliciting a grant of immunity for Dixon had been the subject of a "full" evidentiary hearing in the district court. Respondent submits that the circuit court properly and reasonably interpreted this Court's remand order as not foreclosing further analysis under § 2254(d) and that the result reached in this case is proper.

By way of background, Petitioner's claim that Dixon allegedly testified under grant of immunity and that the trial court found this as fact is based on the trial court's statement in the form which is required to be filled out by a trial judge under O.C.G.A. § 17-10-35. (Trial Record, p. 47-54). Contrary to Petitioner's assertions, however, a prosecutor has no opportunity or duty under O.C.G.A. § 17-10-35(a) to review and correct this form. Indeed, the form in this case recites:

> "This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and
> (1) His comments are attached ( )
> (2) He stated he has no comments ( )
> (3) He has not responded ( ).

(Trial Record, p. 53). In this case the trial judge did not check any of the three boxes regarding counsel's comments and instead the form has the judge's handwritten notation, "The Defendant's Attorney helped obtain much of the information contained in this report," followed by the trial judge's initials. Id. Attached to the form are the trial judge's comments in response to the question of whether the judge thought the death sentence in this case was appropriate, providing in pertinent part:

> There were no eye witnesses to the alleged criminal acts. The State's case depended primarily upon the testimony and credibility of Henry Lee Dixon which was corroborated by Burden's potential for violence. The State felt that it was necessary to keep Dixon under a $50,000 material witness bond in order to guarantee his presence at court. This fact was made known to the jury. Also, Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury.

(Trial Record, p. 54).

When Petitioner first raised his conflict of interest claim in his state habeas corpus petition, he did not base it on any assertion that it was based on counsel having allegedly secured immunity for Dixon. Instead, it was in his federal petition that Petitioner claimed that a conflict of interest manifested itself when Dixon allegedly testified at his own preliminary hearing against Petitioner while Petitioner and Dixon were both represented by the public defender's office of the Middle Judicial Circuit. Burden, 871 F.2d at 957. The circuit court remanded this case for a federal evidentiary hearing as "a comprehensive history of both Dixon's and Burden's representation is necessary" to evaluate the conflict of interest claim as many questions were not answered by the record, such as who allegedly secured the grant of immunity for Dixon. 871 F.2d at 957.

At the federal hearing the transcript of Dixon's preliminary hearing was introduced by Respondent to show that Dixon was not even present; hence, Dixon could not have testified against Petitioner at Dixon's own hearing as Petitioner had claimed in his petition. (District court order, p. 4). The district court found as fact that "after" Dixon's preliminary hearing where Dixon was not bound over but ordered to be held under a material witness bond, public defender Kondrizter and prosecutor Malone had informal discussions about what would happen to Dixon. Id. The court also credited the testimony of prosecutor Malone that, if transactional immunity were granted, it would be formally agreed to by the parties and that there was no evidence of such in this case. Id. at 5. That court concluded that Petitioner had not shown that either public defender had secured immunity for Dixon and that no conflict of interest had been shown.

The circuit court affirmed the district court's findings of fact and concluded no conflict of interest had been shown. Burden, 903 F.2d at 1359-61. The court specifically noted:

> Had the facts been as Burden originally presented them to us, we would have had no difficulty concluding that Kondrizter's representation of Dixon had required him to sacrifice Burden,

> reflecting an actual conflict and adversely affecting his representation of Burden. It is now apparent, however, that this serious allegation is factually incorrect: Kondritzer, while representing Burden did not call Dixon to the stand and elicit testimony manifestly prejudicial to Burden.

Burden, 903 F.2d at 1359. However, the circuit court never addressed the trial court's report with respect to the alleged grant of immunity to Dixon.

On certiorari Petitioner claimed that the circuit court had erroneously failed to afford a preumption of correctness to the trial court's finding with regard to immunity in the trial judge's report. This Court found that the trial judge expressly found that Dixon was granted immunity from prosecution and that this was a historic fact entitled to be presumed correct. Burden v. Zant, 111 S.Ct. at 864. However, this Court went on to note:

> A habeas court may not disregard this presumption unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met, and it explains the reasoning in support of that

> conclusion. See Sumner v. Mata, 449 U.S. 539, 549, 551, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981). The Court of Appeals did not even mention the trial court's finding that Dixon received immunity, much less explain why that finding is not entitled to a presumption of correctness.

Burden, 111 S.Ct. at 864.

This Court concluded its opinion by stating:

> Consequently, we reverse and remand so that the Court of Appeals may consider petitioner's conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that Dixon testified under a grant of immunity.

Burden, 111 S.Ct. at 865.

On remand, the Court of Appeals quoted the above-language and in a footnote construed this Court's opinion as not foreclosing analysis of whether one of the exceptions to the presumption of correctness might be present in this case. Burden v. Zant, 975 F.2d at 772 n.2. The circuit court explained:

> In another part of its opinion, the Supreme Court noted its agreement with Burden's claim that we "improperly failed to give a presumption of correctness to a state-court factual finding, in violation of 28 U.S.C. § 2254(d)." Burden, ___ U.S. at ___, 111 S.Ct. at 863. Considering that the

> Court did not suggest that none of the exceptions to a presumption of correctness listed in § 2254(d)(1)-(8) applies, we do not read its opinion as foreclosing our consideration of these exceptions.

Burden, 975 F.2d at 772 n.2.

Respondent submits that the Court of Appeals did not exceed the scope of this Court's remand as this Court did not foreclose consideration of whether one of the statutory exceptions to the presumption of correctness may be present in this case, given this Court's observation that a federal habeas corpus court may not disregard a finding of historical fact by a state court unless it explains why that finding is not entitled to a presumption of correctness. This Court's opinion may be reasonably construed as merely identifying the "flaw" in the panel's opinion, that is, the Court of Appeals' failure to address the state court's trial report at all in disposing of the conflict of interest issue based on the claim of immunity. The Court of Appeals on remand cured that perceived deficiency by explaining why, after an examination of the record, the state trial judge's comment in the O.C.G.A. § 17-10-35 report was not fairly supported by the record.

Respondent submits that Petitioner seeks to invoke the law of the case doctrine because he obviously disagrees with the result of the Court of Appeals' decision regarding the presumption of correctness. Respondent submits that the

explanation and conclusion why the trial judge's report should no longer be presumed correct was proper and amply supported by the entire record in this case.

The panel noted that the trial judge's report itself is a "standard 6-1/2 page questionnaire" which is simply viewed by the Supreme Court of Georgia as "an administrative convenience." Burden, 975 F.2d at 773, n.8, quoting Thomas v. State, 240 Ga. 393, 242 S.E.2d 1, 7 (1977), cert. den., 436 U.S. 914, 98 S.Ct. 2255, 56 L.Ed.2d 415 (1978). The Court of Appeals observed:

> A state court finding of historical fact is generally entitled to a presumption of correctness. 28 U.S.C. § 2254(d). In certain circumstances, however, this presumption does not attach. See Id. § 2254 (d)(1)-(8). As we explain below, we conclude that the material fact at issue here -- whether Kondritzer negotiated and obtained transactional immunity for Dixon in exchange for testifying against petitioner -- was not adequately developed before the state trial court. Therefore, pursuant to 28 U.S.C. § 2254(d)(3), we may not presume the correctness of the state trial court's comment on Dixon's immunity. [Footnote omitted].
>
> There was never a hearing on the issue of Dixon's immunity in the state trial court and the court's comment on Dixon's immunity did not appear in the context of findings of fact and conclusions of law. The trial court completed the post-conviction report based on its impression of what occurred during

> petitioner's trial. [Cite omitted]. The only evidence presented at trial suggesting that the state granted Dixon immunity in exchange for his testimony against Burden appeared in Dixon's response to [defense counsel] Moses' questions on cross-examination.

Burden, 975 F.2d at 774. The court went on to quote the colloquy between Mr. Moses, defense counsel for Petitioner, and Mr. Dixon wherein Mr. Dixon said he had been promised immunity for his testimony, that he could not really say if he had been told he could get out of jail, and could not say what he had been told about getting released from jail. Id. The Eleventh Circuit also observed that the trial court's "impression that Dixon had received immunity" may have also arisen from the closing arguments in which the prosecutor had argued that Dixon may have received immunity but that nothing had come of it because the charges against Dixon were dismissed and that defense counsel had stated that even Dixon did not know "for what" he had received immunity. Id. at 775.

The circuit court concluded that it was "clear" that the issue of whether public defender Kondritzer had in fact negotiated immunity for Dixon "was not adequately developed in the state trial court" and that this fact was only important at trial for purposes of impeachment so that "the parties spent little time or effort debating it." Id. The court further observed that the colloquy between Dixon and defense attorney

Moses raised more questions that it had answered because it did not disclose any details of any alleged grant of immunity and that it was "this very uncertainty surrounding key factual questions relevant to Burden's allegation" regarding immunity that was the reason why the court had ordered the federal evidentiary hearing. Id. The court concluded:

> Thus, in our judgment, it would be improper to presume the correctness of the state trial court's comment about Dixon's immunity. Rather, it was essential that the district court, on habeas corpus review, conduct a full and fair hearing regarding the facts surrounding petitioner's claim. Only in this way could the parties adequately develop the material facts of petitioner's claim -- principally, whether Dixon testified under a grant of transactional immunity that Kondritzer obtained from the prosecution -- so that we could make an informed decision concerning the merits of this claim.
>
> After a full hearing, the district court concluded that Dixon did not testify under a grant of transactional immunity or pursuant to a promise that the State would not prosecute him for his part in the crimes at issue. This finding by the district court is not clearly erroneous. Therefore, we affirm the district court's conclusion that petitioner's conflict of interest claim is meritless.

Burden, 975 F.2d at 775.

Under Petitioner's rationale, once a fact had been found by a state trial judge, it can never be shown to be erroneous or

otherwise not supported by the record. For example, under Petitioner's rationale, if a witness testified a trial that he had not received a "deal" for his testimony and that testimony were then reflected in the trial court's report, then Petitioner would be forever bound by that "fact" and would be foreclosed from attempting to establish that the "fact" was not correct and not entitled to a presumption of correctness. This Court has not previously construed the presumption of correctness as being this inflexible.

In conclusion, Respondent submits that a review of this Court's entire opinion shows that the Eleventh Circuit reasonably concluded that it was not foreclosed from analyzing the record to determine whether the presumption of correctness did or did not apply. For these reasons, Respondent would urge this Court to deny certiorari in this case as the decision of the Court of Appeals is amply supported by the record.

II. THE COURT OF APPEALS DID NOT CREATE A NEW RULE OF LAW REGARDING CONFLICTS OF INTEREST.

In the second question presented for review, Petitioner urges this Court to grant certiorari because he contends that the Court of Appeals allegedly created a new rule of law with regard to conflict of interest claims because it allegedly based its finding that Dixon had not received immunity in part on the basis that there was no written indicia of same. Respondent submits that Petitioner has taken an observation of the court out of context. The Court of Appeals simply noted that, given the state of Georgia law regarding whether grants of immunity should be in writing, it was highly likely that such a grant of immunity would have been in writing and that the absence of any writing simply buttressed the Court's conclusion, discussed above, that Dixon had not been granted immunity so that no conflict of interest claim existed.

At the time Petitioner's case was tried in March 1982, Georgia law had not been fully settled with regard to whether a trial court had to approve formally a grant of immunity. State v. Hanson, 249 Ga. 739, 295 S.E.2d 297 (1982). Georgia law clearly provided that court approval "is not necessary to a mere decision to dismiss charges where there is no promise to forego prosecution in the future." Hanson, 249 Ga. at 744.

The Georgia Supreme Court further noted that "in this state it has been indicated, although not decided, that a prosecutor may make an agreement to forego prosecution only with the approval of the court." Id. at 746. The court made clear in Hanson that in the future, court approval of any agreement of immunity was required. Id.

The record in this case further shows that former public defender Kenneth Krondritzer, who represented Henry Lee Dixon at the preliminary hearing where Dixon was not present and was not bound over because of insufficient evidence, could not recall having any discussions with the prosecutor prior to Dixon's state preliminary hearing. (Federal transcript p. 37-39, 41). Mr. Kondritzer recalled at the federal hearing that he had asked the prosecutor what was going to happen to Henry Lee Dixon because Mr. Krondritzer had thought that incarcerating Dixon on a material witness bond was "outrageous." Id. at 41-42. Prosecutor Richard Malone apparently indicated to Mr. Krondritzer that Dixon would not be prosecuted and for Mr. Krondritzer not to worry. Id. This conversation occurred after the state preliminary hearing for Dixon. Id. Mr. Krondritzer merely "thought" the prosecutor indicated an interest in having Dixon testify against Petitioner, but again these discussions occurred after Dixon's preliminary hearing. Id. at 42-46. Mr. Krondritzer did not

recall promising that Dixon would testify against Petitioner. Id. at 46.

The record in this case shows that Mr. Krondritzer never offered the testimony of Mr. Dixon against Petitioner. The record also shows that neither public defender formally or informally secured immunity for Mr. Dixon. Any discussions between Mr. Krondritzer and the prosecutor about immunity for Mr. Dixon, if they had occurred, happened after Dixon's state preliminary hearing where, again, Dixon was not bound over and a material witness bond was set after the trial court sua sponte initiated the subject of a material witness bond. Neither Mr. Krondritzer or Mr. Moses ever sought to have the material witness bond dissolved or otherwise took any action on behalf of Mr. Dixon after the preliminary hearing. After inheriting Petitioner's case from Mr. Kondritzer, Mr. Moses did interview Dixon in preparation for Petitioner's trial and Mr. Dixon told attorney Moses that Dixon thought he had immunity. (F.T. 51, 57). It was Mr. Moses who elicited testimony from Dixon at trial about the immunity and any potential bias for Dixon's testimony. (Trial Transcript 649). It was also Mr. Moses who helped the trial court fill out the "report."

In examining the record to determine whether there was "fair support" for the trial court's statement in the judge's report that Dixon had received immunity, the circuit court

relied upon State v. Hanson with regard to the status of Georgia law on immunity, noting that a trial court generally had to agree a prosecutor's decision to forego prosecution. Burden, 975 F.2d at 774 n. 9. The circuit court further observed that prosecutor Malone had testified at the federal evidentiary hearing that, in his circuit, where a person had been given transactional immunity, it had been done in writing. Id. The Court of Appeals noted that in State v. Hanson, decided six months after Petitioner was tried, the Georgia Supreme Court held that any future grants of immunity must be in writing. The court concluded:

> We would expect, then, to find some documentary evidence establishing that Dixon received a promise to forego prosecution in exchange for his testimony pursuant to a court-approved agreement between his attorney and the prosecutor. The record, however, contains none. See Burden II, 903 F.2d at 1360. Petitioner instead relies on informal negotiations between his attorney and the prosecutor to support his claim that Dixon testified under a grant of immunity. Thus, the record may be insufficient to support the state court's observation. See 28 U.S.C. § 2254(d)(8). We, however, do not rely on this deficiency in deciding that the state trial court's observation is not entitled to a presumption of correctness.

Burden, 975 F.2d at 774 n.9.

Thus, when viewed in context, the Court of Appeals was not creating a new rule of law with regard to written indicia of

immunity to find a conflict of interest claim. Rather, the Court merely examined Georgia law to determine whether such agreements would have to be formalized in writing. Finally, the Court made clear that its decision that the state court's fact finding was not supported by the record did not rely on the absence of written indicia but simply corroborated the Court's conclusion from examining the entire record. For these reasons, Respondent would urge this Court to deny certiorari as the decision sought to be reviewed as demonstrably in accord with prior decisions of this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit as it is manifest that the questions presented to this Court for review were correctly decided under precedent of this Court and that no federal questions not previously decided by this Court are presented.

Respectfully submitted,

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40 Capitol Square
Atlanta, Georgia 30334-1300
(404) 656-3351

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

John H. Blume
Esquire
South Carolina Death Penalty Resource Center
P. O. Box 11311
Columbia, South Carolina 29211

This 16th day of September, 1993.

PAULA K. SMITH
Senior Assistant
Attorney General